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MISTAKE IN THE LAW OF TORTS.

THE only rational basis for allowing recovery in tort seems to be blamableness. To allow one man to compel another to make good a loss which the first has suffered, when that other is no more to blame than he, simply transfers the misfortune from one innocent party to another equally innocent. That it was the defendant whose act caused the loss does not alter the case. People must act. One cannot then be considered reprehensible merely because he has acted. Because of this necessary action accidents will happen and losses will occur when neither party is at all in fault. If the law is to do anything in such cases the sensible thing would be to divide the loss equally between the parties concerned. The common law does not do this. The reasons no doubt are historical. In a rude stage of civilization it seemed fairly reasonable to make a man pay for all the damage he had done, and the rule of absolute liability was the result. In getting away from that rule the courts have held that, in this case and that where previously there was liability, there shall be no recovery. As a result, in many cases the party suffering the loss can recover nothing, while in the rest he can hold the defendant liable for all the damage done. Granting that we cannot have a division of misfortune, it is useless simply to shift it unless for good reason. It is better, then, where neither party is to blame, to let the loss lie where it happens to fall.

There is of course nothing new in the above paragraph. The

same ideas have been well expressed again and again.¹ Their good sense has appealed to the judges, and as a result our law of torts has been changed from one of absolute liability to one in which for the most part recovery is based on culpability.² Now, it can be safely said that for accidental injury one is not liable.³ However, in a large class of cases, which may be called cases of mistake, there is no fault on the part of the defendant, just as there is none in cases of accident, and yet recovery is allowed. To call attention to this aspect of such cases this paper is written.

What are cases of mistake? Accident and mistake have been confused occasionally. We can best understand mistake by contrasting it with accident. The terms "intention," "negligence," and "accident," have reference to the *effect* produced by the tortious conduct and not to the conduct itself. Otherwise all torts would be intentional in the sense that the actor's bodily activity is intended.⁴ An intentional tort is one in which the wrongdoer actually foresees and intends an effect,⁵ which is an injury to the other party. Likewise a negligent tort is one in which the wrongdoer as a prudent man should have foreseen that such an effect was probable enough to warrant foregoing the conduct or guarding against its consequences. The legal idea of accident negatives both intention and negligence. A case of accident then is one where the *effect* was neither intended nor was so probable a result as to make the conduct negligent. On the contrary, in the cases of mistake that arise⁶ the *effect* is *intended*, and the error consists in

¹ As in *Brown v. Collins*, 53 N. H. 442 (1873).

² Holmes, Com. Law, chap. i.-iv.; Wigmore, 7 HARVARD LAW REVIEW 315, 383, 441.

³ Exceptions exist, of which the following may be mentioned: (a) Damage done through violating a statute passed to prevent such damage. *Norton v. Co.*, 113 Mass. 366 (1873). (b) Damage done in committing a seriously wrongful act. *Peterson v. Haffner*, 59 Ind. 130 (1877). (c) Injury to adjoining land by removing support. *Gilmore v. Driscoll*, 122 Mass. 199 (1877). (d) Injury committed by animals when trespassing on realty, or elsewhere when the owner has *scienter*. *Noyes v. Colby*, 30 N. H. 143 (1855); *Reynolds v. Hussey*, 64 N. H. 64 (1886). (e) Injury occasioned by using fire — a possible exception in England not existing in the United States. *Batchelder v. Heagan*, 18 Me. 32 (1840). (f) The *Fletcher v. Rylands* exception, not always followed in the United States. *Marshall v. Wellwood*, 38 N. J. L. 339 (1876).

⁴ Holmes, Com. Law, 54, 55, 91, 94-95.

⁵ If one injurious effect be intended but another accidentally follows, it is not a case of intentional tort. However the actor is liable under one of the exceptions to the accident rule if the result intended was seriously wrongful. See *ante*, p. 336, note 3 (b).

⁶ The writer knows of no case where one committed a negligent tort because of mistake. One shooting at an object near a horse under circumstances showing carelessness as to the safety of the horse, relying for excuse on the fact that he thought the horse his own, would raise the question. No doubt the decision would be the same as if he had intended to kill the horse under the same mistake.

thinking that such an effect is not tortious.¹ To illustrate: one who, knowing his neighbor's line is but ten feet away, cuts down a tree in such a way that under all probable conditions it would fall upon his own land and not on his neighbor's, commits but an accidental trespass if through some improbable defect in tree or soil it actually falls on his neighbor's land. The entry into the land which belonged to his neighbor, which is the injurious effect, was neither intended nor reasonably to be foreseen. But one who thinks he owns all the land which the tree could possibly fall on, and intentionally cuts it so that it falls on land which turns out to be his neighbor's, has committed an intentional trespass under mistake. The falling of the tree upon the land in question was intended under the erroneous notion that such a result would violate no one's right. Again, one who shoots a rifle in a forest in which another's presence is highly improbable will commit an accidental battery if the ball glances and strikes some one who chances to be near by. The contact was not intended and could not reasonably be expected. But if the hunter shoots at a thing which he reasonably supposes to be a bear, but which turns out to be a shepherd's dog, he has committed a trespass to personalty under mistake. The contact was intended under a mistaken idea that it was an injury to no one.²

There may be mistakes not of this character. A mistake may show that there was neither intention nor negligence, and so prevent liability. One who does an act under an erroneous notion of the surrounding conditions which will determine what the effect of the act will be, which notion, if true, would make an injurious effect improbable, is not negligent unless careless in entertaining the belief. He did not intend and could not reasonably anticipate the effect which followed. The mistake makes it a case of accident. The authorities as to accident and not those as to mistake govern the case. In the *Nitro-Glycerine Case*³ the defendants, Wells, Fargo & Co., transported a box from New York to San Francisco. On arrival its contents, appearing like sweet oil, were found leaking. It was taken to the store-room for examination. A servant attempted to open it. The contents, being nitro-glycerine, exploded, destroying much of the plaintiff's property adjoining that used by the express company. Negligence either in receiving the

¹ This language includes both mistakes of law and mistakes of fact. The present discussion, without attempting any very careful discrimination between the two, will be confined to mistakes of fact. The cases make little of the difference, but perhaps because even mistakes of fact do not excuse.

² Cases similar to these hypothetical ones are cited later.

³ 15 Wall. 524 (1872).

box for carriage or in not recognizing the contents, nitro-glycerine being then comparatively unknown, was negatived. If the contents had been sweet oil, as defendants mistakenly supposed, no injury to plaintiff's property would have resulted. There being no negligence in making the mistake, the case was one of accident and the plaintiff failed to recover.¹

There are other cases where mistake prevents some other element of the tort from being present, and so makes liability impossible. Honest error would often show that so-called "malice" was not present, though not always nor necessarily. One who believed in his cause usually would not be prosecuting maliciously,² but he might be. If the occasion of uttering defamation were privileged and the defendant believed his statement true, he would not often be found malicious. In any case where malice is essential this use of mistake would be permissible in defence.³ In conversion mistake may show that there was no intent to convert at all.⁴ In deceit an honest belief in what was said would establish absence of the fraud which is usually held a necessary element of the tort.⁵

¹ Many cases might be added, but the principle is clear. In the same way a mistake in supposing that no one is in a position to be injured by defendant's act, if non-negligent, makes a case of accident. *Sutton v. Bonnett*, 114 Ind. 243 (1888). If the mistake is negligent there is liability. *Bahel v. Manning*, 70 N. W. 327 (Mich., 1897); *Whitten v. Hartin*, 163 Mass. 39 (1895).

² *Davies v. Jenkins*, 11 M. & W. 745 (1843), in which it was held that where, because of identity of names, proceedings had been instituted against the wrong person, an action on the case for malicious prosecution would not lie as the mistake showed lack of malice.

³ In such cases but for the defendant's mistake he usually would be liable, and one might conclude that it is his *bona fide* error that excuses him. But it is not primarily lack of culpability that creates the defence, but some public policy, such as the desire to have criminals prosecuted, to have bad characters discovered when the interest of the parties makes that proper, and the like. This is clear whenever the error was made negligently. Then there is culpability, and yet the defendant is not held for lack of the showing of malice. Thus these cases cannot fairly be used as authorities on the mistake question. Of course it is arguable that in cases where only non-negligent mistake frees the defendant it is some public policy and not lack of culpability that brings about the result. But it is believed that several of the instances cannot be accounted for on such grounds. (The difference between negligent and non-negligent mistake is noticed on p. 339.)

⁴ *Nelson v. Whetmore*, 1 Rich. 318 (S. C., 1845). The defendant mistakenly thought that a negro was free and assisted him to get North. Held, that these facts constitute no conversion, as the defendant, not knowing he was dealing with property, could not be asserting dominion.

⁵ *LeLievre v. Gould*, [1893] 1 Q. B. 491. Of course if fraud is required the mistake though negligent prevents liability. If negligent deceit be considered actionable and deceit brought within the general theory of torts, non-negligent belief in the truth of the statement would make out a case of accident, since it would show that damage, which is the injurious effect required, was neither intended nor reasonably to be foreseen.

All such cases equally should not be considered in determining whether mistake excuses what would otherwise be a tort. They show that on other grounds no tort was committed. The cases of mistake which we need to consider, then, are only those where a tort plainly has been committed unless mistake in itself excuses. The question is, does the mistake prevent liability?

At the outset it is to be noticed that the mistake may be made either negligently or non-negligently. A negligent mistake may be defined as one which a prudent man under the circumstances would not make. We should expect to find that a mistake made negligently would not avail a defendant in any way, for only non-negligent mistake is analogous to accident. Such no doubt is the law.¹

Coming, then, to non-negligent mistake, the cases that have arisen may be noticed, contrasting them with those as to accident.

Concerning torts to the person it must now be conceded that there is no liability for accident, whether the wrong takes the form of assault, battery, or imprisonment.² The authorities regarding mistake are by no means so unanimous. On the one hand, we have certain instances where the mistake is held no excuse; on

¹ In those instances where one is held despite even non-negligent mistake the question whether the mistake is negligent or not is immaterial, and so is seldom discussed. *Association v. Rutherford*, 51 Fed. 513 (1893), is, however, a case where the defendant was held for publishing matter, negligently treating it as true, when he would have been equally liable had he non-negligently believed it true. The following cases arose under circumstances where a non-negligent mistake would excuse the defendant, and they hold that a negligent one does not: *Isaacs v. Brand*, 2 Stark. 167 (1817), where an officer arrested one for felony on unreasonable suspicion; *Allen v. Wright*, 8 C. & P. 522 (1838), where a private person arrested the plaintiff for felony on unreasonable suspicion that he committed it; *Carratt v. Morley*, 1 Q. B. 18 (1841), where a judge made a negligent mistake of fact as to jurisdiction; *King v. Franklin*, 1 F. & F. 360 (1858), where a captain unreasonably thought that the plaintiff was engaged in a mutiny; *Hill v. Rogers*, 2 Ia. 67 (1855), *semble*, where the defendant unreasonably thought defence of another necessary; *Murdock v. Ripley*, 35 Me. 472 (1853), where the defendant unreasonably thought excessive force necessary to accomplish an arrest; *State v. Bryson*, *Winston*, Law (No. 2), 86 (N. C., 1864), where the defendant unreasonably thought he was about to be struck.

² As to whether there is perhaps no case in point, except as all cases of battery are in point, since a battery includes an assault; but it is clear that there is no liability because (a) there is no liability even for negligent assault unless damage other than fear or expectation of contact follows, *Kalen v. Ry.*, 47 N. E. 694 (Ind., 1897), and (b) liability for negligent assault, even when physical injury follows the fear, is disputed, *Vict. Ry. Com. v. Coultas*, 13 A. C. 222 (1888); *Spade v. Ry.*, 47 N. E. 88 (Mass., 1897); *Purcell v. Ry.*, 50 N. W. 1034 (Minn., 1892). As to battery, *Stanley v. Powell*, [1891] 1 Q. B. 86, and *Brown v. Kendall*, 6 Cush. 292 (Mass., 1850), settle the law. Cases of accidental imprisonment seem lacking, but no doubt the law is the same. Locking a room which defendant reasonably supposed plaintiff had left would be an example.

the other hand, we have even more numerous sets of circumstances in which the defendant is not held. In the following cases the mistake does not aid the defendant: where an officer with valid process arrests the wrong person,¹ or arrests on process not fair on its face,² or commits a battery mistakenly supposing that the plaintiff is unlawfully resisting a levy;³ where a private person arrests for a felony without warrant when none had been committed;⁴ where, without warrant, there is an arrest of one mistakenly supposed to be breaking the peace;⁵ where the defendant erroneously supposes that he is defending his property against non-criminal invasion,⁶ that he is recapturing his property,⁷ or that the plaintiff is a lunatic proper to be imprisoned.⁸ But in the following cases the mistake excuses: where an officer supposes one to be subject to arrest who has a privilege;⁹ where a private person mistakenly supposes that an officer whom he assists has proper process;¹⁰ where an officer erroneously thinks that the plaintiff is a felon,¹¹ or where a private person, a felony having actually been committed, makes the same mistake;¹² where the defendant wrongly supposes that the plaintiff is the aggressor in an affray,¹³ or that the plaintiff is assaulting him when in fact no attack is being made,¹⁴ or another is the assailant;¹⁵ where the defendant commits

¹ *Coote v. Lighworth*, Moore 457 (1596); *Shadgett v. Clipson*, 8 East 328 (1807); *Hoye v. Bush*, 2 Scott N. R. 86 (1840); *Com. v. Kennard*, 8 Pick. 133 (Mass., 1829), *semble*; *Griswold v. Sedgwick*, 1 Wend. 126 (N. Y., 1828); *Formwalt v. Hylton*, 1 S. W. 376 (Tex., 1886).

² *Rafferty v. People*, 69 Ill. 111 (1873); *Com. v. Crotty*, 10 Allen 403 (Mass., 1865).

³ *Elder v. Morrison*, 10 Wend. 128 (N. Y., 1833); *Brownell v. Durkee*, 79 Wis. 658 (1891).

⁴ *Samuel v. Payne*, 1 Doug. 359 (1780).

⁵ *Phillips v. Fadden*, 125 Mass. 198 (1878).

⁶ *Hall v. Powers*, 12 Met. 482 (Mass., 1847).

⁷ *Bowman v. Brown*, 55 Vt. 184 (1882).

⁸ *Fletcher v. Fletcher*, 28 L. J. R. (Q. B.) 134 (1859); *Van Deusen v. Newcomer*, 40 Mich. 90 (1879)—where, however, the court was equally divided, and the case was sent back on other grounds.

⁹ *Countess of Rutland's case*, 6 Co. 53 (1606); *Cameron v. Bowles*, 2 W. Bl. 1195 (1778); *Tarlton v. Fisher*, 2 Doug. 671 (1781).

¹⁰ *Firestone v. Rice*, 71 Mich. 377 (1888). *Contra* is *Elder v. Morrison*, 10 Wend. 128 (N. Y., 1833).

¹¹ *Samuel v. Payne*, 1 Doug. 359 (1780); *Doering v. State*, 49 Ind. 56 (1874).

¹² *Mali v. Lord*, 39 N. Y. 381 (1868).

¹³ *Timothy v. Simpson*, 1 C. M. & R. 757 (1835).

¹⁴ *Shorter v. People*, 2 N. Y. 193 (1849); *Redd v. State*, 99 Ga. 210 (1896).

¹⁵ *Paxton v. Boyer*, 67 Ill. 132 (1873). In this case the court entirely disregarded the distinction between accident and mistake, and relied solely on accident cases for its decision. *Morris v. Platt*, 32 Conn. 75 (1864), an accident case cited by the court, and *Paxton v. Boyer* itself are also treated as identical by Professor Ames, Cases on

a battery on the plaintiff in defence of another person mistakenly thinking that his interference was necessary to repel the plaintiff's assault on such person;¹ where the defendant erroneously supposes he is defending his property against criminal attack;² where a parent,³ teacher,⁴ or captain of a vessel⁵ thinks that actions which deserve punishment have taken place; where a judge makes a mistake of fact as to his jurisdiction,⁶ or a like mistake as to the merits of the case.⁷ There are other instances where the question has arisen, but these sufficiently show the clear divergence of holding.

It is believed that no adequate distinction can be drawn between these two lines of cases. The injury inflicted by the defendant may be as great in one as in the other. The chances of mistake seem about equal. When the defendant is protecting himself against supposed injury, there seems some tendency to excuse him because of the mistake when the injury would be very serious, but not otherwise. For example, in the case of supposed battery to his person or criminal entry into his house, he is excused if he attacks the person he thinks a wrongdoer, while he is not in the case of an entry on land if merely a civil wrong. But preventing a dangerous lunatic from causing injury is about the same as preventing an attack on the person, and yet in that case the defendant is held. The distinction between cases where an officer arrests the wrong person and those where he arrests a privileged person is rather shadowy, since he does not have to make the erroneous arrest in either case.⁸ Also, why is it

Torts, 71, n. 4, and Shearman and Redfield, Negligence, i. 16, n. 5. This only shows how very analogous on principle accident and mistake are.

¹ Hill v. Rogers, 2 Ia. 67 (1855).

² Smith v. State, 32 S. E. 851 (Ga., 1899); Bell v. Martin, 28 S. W. 108 (Tex., 1893).

³ State v. Jones, 95 N. C. 588 (1866). This is a case where public policy at least aids in creating the defence. Some courts hold malice necessary. Dean v. State, 8 So. 38 (Ala., 1890). Others excuse only in case of non-negligent mistake. Johnson v. State, 2 Hump. 283 (Tenn., 1837).

⁴ Patterson v. Nutter, 78 Me. 509 (1886). Some courts here also require malice. State v. Pendergrass, 2 D. & B. 365 (N. C., 1837). Others do not. Lander v. Seaver, 32 Vt. 114 (1859).

⁵ King v. Franklin, 1 F. & F. 360 (1858), *semble*.

⁶ Calder v. Halket, 3 Moo. P. C. 28 (1840).

⁷ Pratt v. Gardner, 2 Cush. 63 (1848). Here the decisions require malice, and no doubt public policy is responsible. Kemp v. Neville, 10 C. B. N. s. 523 (1861). This case and that of parents are hardly authorities for freeing defendant *on the ground of mistake* (see *ante*, p. 338, n. 3), but are stated for completeness. They show that in such cases he is not held.

⁸ He may be subject to punishment for contempt if he arrest one privileged, as a suitor going to or returning from court. Cameron v. Lightfoot, 2 W. Bl. 1190 (1778); Magnay v. Burt, 5 Q. B. 381 (1843). He is not bound to execute process on privileged goods. Winter v. Miles, 10 East 578 (1809).

that an officer has such exemption from liability for error when he is acting without warrant, and yet is held so strictly when acting under a warrant? If anything, one would expect more stringency when acting without warrant. Keeping in mind that in all the cases the defendant can be accused of no lack of care, it does seem that a different decision might well have been reached in those instances where he is held liable. No doubt the doctrines that an officer is liable for an arrest not covered by the process, and that a private person cannot justify an arrest for felony without a warrant unless a felony has been committed, are too well established for judicial overthrow. But in other cases where the law is not so clear, the rule that one is not liable in tort unless culpable might well be applied.

The rule as to accident applies to injuries to personalty quite as fully as to wrongs to the person.¹ On the other hand, in cases of mistake the courts almost invariably refuse to free the defendant. He has been held: where he thought he owned the property,² or that he had a qualified interest which justified his action;³ where he had authority from one supposed to be owner;⁴ where he was a sheriff levying on wrong goods,⁵ or a private party aiding a sheriff

¹ *Wakeman v. Robinson*, 1 Bing. 213 (1823), *semble*; *Goodman v. Taylor*, 5 C. & P. 410 (1832); *The William Lindsay*, L. R. 5 P. C. 338 (1873); *Stainback v. Rae*, 14 How. 532 (U. S., 1852); *R. R. v. Zackary*, 53 S. W. 327 (Ind. T., 1899); *Jackson v. Castle*, 80 Me. 119 (1888); *Dyert v. Bradley*, 8 Wend. 469 (N. Y., 1832). It makes no difference that the wrong is a conversion. *Simmons v. Lillystone*, 8 Ex. 431 (1853).

² *Clifton v. Chancellor*, Moore 624 (1600); *Basset v. Maynard*, Cro. Eliz. 819 (1601); *Ford v. Hopkins*, 1 Salk. 284 (1700); *Wilkinson v. King*, 2 Camp. 335 (1809); *Peer v. Humphrey*, 2 A. & E. 495 (1835); *Walker v. Matthews*, 8 Q. B. Div. 109 (1881); *Hobart v. Hagget*, 3 Fairf. 67 (Me., 1835); *Stanley v. Gaylord*, 1 Cush. 536 (Mass., 1848), *semble*; *Gray v. Stevens*, 25 Vt. 1 (1855); *Dexter v. Cole*, 6 Wis. 319 (1858); *Hazleton v. Week*, 49 Wis. 661 (1880). In Indiana, New York, and possibly elsewhere, a peculiar rule prevails holding that a *bona fide* purchase is not a conversion. *Valentine v. Duff*, 34 N. E. 453 (Ind., 1893); *Gillet v. Roberts*, 57 N. Y. 33 (1874). But even in those jurisdictions other acts as owner, though done *bona fide*, make one liable. *Pease v. Smith*, 61 N. Y. 477 (1875).

³ *Hartop v. Hoare*, Str. 1187 (1743); *Hoare v. Parker*, 2 T. R. 376 (1788), the court thinking that the rule was erroneous; *M'Combie v. Davies*, 6 East 538 (1805); *Soc. v. Bank*, 17 Q. B. Div. 705 (1886); *Stanley v. Gaylord*, 1 Cush. 536 Mass., 1848). *Contra* are *Spackman v. Foster*, 11 Q. B. Div. 99 (1883); *Leuthold v. Fairchild*, 27 N. W. 503 (Minn., 1886).

⁴ *Stephens v. Elwall*, 4 M. & S. 259 (1815); *Featherstonhaugh v. Johnston*, 8 Taun. 237 (1818); *Hiort v. Bott*, L. R. 9 Ex. 86 (1874); *Co. v. Curtis*, [1892] 1 Q. B. 495; *Higginson v. York*, 5 Mass. 341 (1809); *Donahue v. Shippee*, 15 R. I. 453 (1887).

⁵ *Cremer v. Humbertson*, 2 Keb. 352 (1669); *Glasspoole v. Young*, 9 B. & C. 696 (1829); *Davies v. Jenkins*, 11 M. & W. 745 (1843) *semble*; *North v. Peters*, 138 U. S. 271 (1891); *Breichman v. Ross*, 67 Cal. 601 (1885); *Miller v. Bannister*, 109 Mass.

in so doing,¹ or a subordinate public officer acting under orders from his superior;² where he and other assignees in bankruptcy seized property not belonging to the bankrupt;³ where he thought he was justified for the purpose of protecting the property;⁴ where he thought the property wild game.⁵ On the other hand, he has been excused: where he was an officer levying on property privileged from execution;⁶ where he dealt with property under a statute concerning lost property and the property in question proved to be merely hidden;⁷ where he was a judge making a mistake of fact as to jurisdiction,⁸ or merits.⁹

There is little room for argument in the face of such an overwhelming weight of authority. It is important to notice that the contrary might have been held, and yet the rule that the owner may follow his property maintained. It is conceivable that the law should allow the owner to regain his property, and yet that he should have no action for damages against any one who had dealt with it in the non-negligent belief that he was acting rightfully. Without attempting, then, to combat the doctrine of *caveat emptor*, the question whether liability in tort should be allowed may be considered. Certainly about all that can be said for the doctrine is said by Chief Justice Holmes in the Common Law.¹⁰ He says (a) that the case differs from that of accident, since here the defendant intended the injury. That is true,¹¹ but seems to make no difference in principle except so far as it makes his further arguments possible. He himself admits this. If liability in tort depends on choosing conduct which will surely or probably lead to

289 (1872); *Cook v. Hopper*, 23 Mich. 511 (1871); *Rogers v. Weir*, 34 N. Y. 465 (1866).

¹ *Oystead v. Shed*, 12 Mass. 505 (1815). In *Johnson v. Stone*, 40 N. H. 197 (1860), it was held that one who took property, thinking that the sheriff had levied on it when he had not, was liable, though the sheriff commanded the taking. Concerning *Oystead v. Shed*, it may be said that as to arrests under similar circumstances there is considerable authority which is contrary in principle. See *ante*, p. 340, n. 10.

² *Tracy v. Swartwout*, 10 Pet. 80 (U. S., 1836).

³ *Atkinson v. Maling*, 2 T. R. 462 (1788); *Summersett v. Jarvis*, 3 Brod. & B. 2 (1821); *Benton v. Hughes*, 2 Bing. 173 (1824).

⁴ *Kirk v. Gregory*, 1 Ex. Div. 55 (1876).

⁵ *Ranson v. Kitner*, 31 Ill. Ap. 241 (1888).

⁶ *State v. Morgan*, 3 Ired. L. 186 (N. C., 1842).

⁷ *Sovern v. Yoran*, 16 Ore. 269 (1888). Here the defendant seems to have been mistaken as to the legal meaning of the word "lost." See *ante*, p. 337, n. 1.

⁸ *Pike v. Carter*, 3 Bing. 78 (1825).

⁹ *Moor v. Ames*, 3 Caines 170 (N. Y., 1805). See *ante*, p. 341, n. 7.

¹⁰ Pp. 96-100.

¹¹ As has already been pointed out, *ante*, pp. 336, 337.

wrongful injury to another, — in other words, on culpability, — it is clear that the difference between accident and non-negligent mistake should be disregarded. In neither is the defendant to blame. (b) It is suggested that the defendant intended damage which he expected to bear himself, and that “it would be odd if he were to get rid of the burden by discovering that it (the property he had injured)¹ belonged to another.” It may be answered that this argument would not apply at all where no real loss would follow the act, as, for example, where the defendant merely made a non-damaging use of the plaintiff’s property without right, or simply bought and sold it. In such a case he would expect no loss to himself. It also would not apply where the defendant would stand the loss anyhow, even without satisfying the true owner. Suppose one bought a dog, paying thirty dollars for it, and then killed it. If he had gotten title, his loss would be thirty dollars. If he got none, he will still lose this thirty dollars, unless his rights on his vendor’s warranty of title are really valuable, and yet he must pay thirty more to the owner. This is not paying the owner what he himself would have suffered if owner, but is casting a double loss on him. Again it will not apply except where the defendant thinks he is owner, because in other cases, as where he is acting as agent of the supposed owner, he anticipates no loss to himself. Thus it is only when the defendant could expect damage to follow from his act, when he has given nothing for the property, and so will lose nothing unless compelled to recompense the owner, and when he thinks he is owner, absolutely or qualifiedly, that the argument suggested applies. A justification for this extremely narrow class of cases can hardly be urged to support a general rule. It should rather form an exception to a contrary general rule.² (c) It is said not to be unjust to compel one to know the limits of his own title or of the person by whose authority he is acting. Surely a *bona fide* purchaser might have as difficult a task in discovering whether his vendor really had title as would the defendant in *Brown v. Kendall*,³ if compelled to know who were within reach of his stick. The chance for error is great in both cases. Why different rules? (d) It is stated that where the personalty is

¹ The words in parenthesis are not part of the quotation.

² Justice Holmes, himself, uses the argument only in connection with “trespasses upon land attended by actual damage.” It should, however, be confined to cases where the defendant thought he had an interest in the land, where he had in fact given no value for it, and where the act would have damaged him if owner.

³ 6 Cush. 292 (Mass., 1850).

returned undamaged, or where the realty suffers no damage, only nominal damages can be recovered, which need not carry costs. If the rule were confined to that state of facts, it would work no injustice, but it is not so confined. If so limited, it should be treated as analogous to an action to quiet title, and a disclaimer should free the defendant from costs. In this connection it should be noticed that in many jurisdictions one cannot free himself by offering to give the plaintiff his goods again. Where he has committed a technical conversion, he may be compelled to keep the thing and pay the plaintiff its value, to become a compulsory purchaser.¹ The rule of *caveat emptor* would seem severe enough in allowing the owner to retake his goods from one who bought them *bona fide*, non-negligently, and for value. It increases its rigor to compel the defendant to buy again at a price perhaps far beyond their value to him. Yet this strictness is the logical outcome of the law as to mistake, for if non-negligent mistake prevented liability such a defendant, a *bona fide*, non-negligent, purchaser would not be liable at all and so, of course, would not be affected by the rule in the law of conversion just mentioned. That rule itself may be harsh, but to hold a blameless defendant with such severity is surely its most unfortunate application. (e) The next argument is that since the defendant must give up the thing if he has it,² it is not unjust to make him pay its value if he has the proceeds of a sale of it. But is this true? He no longer has the plaintiff's property; what he has gotten for it he has the legal title to; and so *caveat emptor* cannot aid the plaintiff. If culpability is to be regarded, he has committed no tort, since all his acts were done without reason to know that he was injuring anybody. Any liability in quasi-contract founded on waiving the tort should equally fail.³ And so far as any other equitable liability is concerned, it would seem sufficient answer that the defendant is in no way in fault, and is not unjustly enriched if the whole transaction be considered, as what he got for the property is offset by what he paid for it. Of course in any case where the defendant sold the chattel after having paid nothing for it, he might well be compelled to hold the proceeds for the true owner, on the ground of unjust

¹ *Baltimore & Ohio Ry. Co. v. O'Donnell*, 32 N. E. 476 (Ohio, 1892). *Contra*, *Hiort v. London & Northwestern Ry. Co.*, 4 Ex. D. 188 (1879).

² As just stated, he may not have the right to give it up, though he chooses.

³ The law is of course *contra* because there is held to be a tort. Keener, *Quasi-Contracts*, 170.

enrichment.¹ If by the defendant's use the article has been consumed, the same arguments apply. The benefit he has gained by such use may be detained by him without unfairness, since having paid for the article he is not unjustly enriched, for what he has gained by its use is balanced by the price he paid. If instead of having gained the benefit himself, he is merely an agent, say an auctioneer, and has turned over the proceeds to his principal, his exemption is if anything still clearer, as there he gets no benefit from the sale even in appearance. (*f*) It is next suggested that in early days, when this doctrine arose, the state of one's mind was hard to prove because of exclusion of witnesses on the ground of interest. That may have helped to excuse the rule in its infancy, but cannot warrant its continuance now that questions of one's intentions are passed on every day. (*g*) In the light of what has been stated it seems untrue to say that, "The objections to such a decision as supposed in the case of an auctioneer do not rest on the general theory of liability, but spring altogether from the special exigencies of commerce."² The objection is that such a decision does violate the theory that liability is based on blamableness. If the lack of culpability will relieve one from responsibility for accidental injury, it should also relieve where injury is caused under non-negligent mistake. The exigencies of commerce but make the rule work greater injustice.³

Sir Frederick Pollock, in the first chapter of his treatise on Torts, calls attention to the anomalous character of the rule we have been considering and accounts for it as a result of an early confusion of actions merely to recover property with actions to redress wrongs. The latter being more simple in procedure were sought by suitors desiring merely vindication of property rights, and the courts, without noticing that giving redress as for a wrong was an entirely different thing from merely allowing the owner to regain his property, permitted the innovation.⁴ Whatever the origin of the rule, it certainly is now an anomaly. In the Factors

¹ But this liability, like that of admitting title after a technical trespass, would have no basis in tort proper.

² Common Law, p. 100.

³ Since general principles are not followed, the burden is on those who support the exception. There seems to be no policy in holding the defendant here that could not be urged with equal force in cases of accident. That such a rule leads to greater care being used, that it avoids the difficulty of proving negligence when really present, that it prevents negligent defendants escaping through error or prejudice of juries, these might all be relied on in cases of accident, and have no greater weight here.

⁴ It would be worth while if this could be verified in the early reports.

Acts we see some tendency to get away from it in the hardest cases.¹ While we cannot hope for its entire abolition, we may hope that if its anomalous character were once fully understood it would not be used as furnishing a guiding principle for the decision of analogous cases. In many cases of injuries to the person, we have seen that the principle is not applied. Unfortunately they furnish about the only argument from precedent against the rule.²

If we turn from injuries to personalty to injuries to realty, about the same condition of the law confronts us. As everywhere else there is no liability for accident.³ But in the cases of mistake that have arisen the defendant is held responsible. Such was the decision: where he thought he owned the land,⁴ where he mistook the boundary and so trespassed,⁵ where he thought he had a right

¹ The Factors Acts of course not only overthrow the mistake rule so far as they go, but also pass the title to the innocent party. Whether that is desirable depends on different principles. In an action to recover the property the defendant is not sued for doing wrong, but is merely asked to give up that to which he has gotten no title.

² It is not without weight to notice that the new German Civil Code, secs. 932-936, protects a *bona fide* purchaser from liability, and even gives him title except where the goods were stolen from or lost by the owner. One taking *bona fide* but not for value is liable only so far as he is unjustly enriched, sec. 816. Freund, 13 HARVARD LAW REVIEW 634. The Code Napoléon, Art. 2279, adopts the view taken in this article exactly, making no exception as to lost or stolen property.

Also, cases of conversion under non-negligent mistake in which the damages are measured by the value of the property to the plaintiff in the condition he had it in, while if the mistake is negligent or the wrong wilful greater damages are allowed, show a tendency in the right direction. *Wood v. Morewood*, 3 Q. B. 440, n. (1841); *Lake Shore & Michigan Southern R. R. Co. v. Hutchins*, 32 Oh. St. 571 (1877). *Contra*, *Woodenware Co. v. U. S.*, 106 U. S. 432 (1882). The true view would be to make an innocent defendant liable only so far as he is enriched by his acts, while a blamable defendant should be held only for actual damage done.

³ The Nitro-Glycerine Case, 15 Wall. 524 (U. S., 1872); *Blyth v. Co.*, 11 Ex. 781 (1856); *Sheldon v. Sherman*, 42 N. Y. 484 (1870); *Field v. N. Y. Cent. Ry.*, 32 N. Y. 339 (1865); the numerous other cases of fire, water, explosives, and the like injuring realty could be added. No sound distinction can be drawn between direct and indirect injury as to this question, whether the injury is to realty or personalty, person or other rights. Holmes, Com. Law, 80. The Nitro-Glycerine Case is clearly one of direct injury. A still plainer case would arise if one walking on a sidewalk were to trip on a loose plank, which, however, appeared firm, and were thus to fall into plaintiff's store window. Surely there would be no liability for the resulting damage. *Newsome v. Anderson*, 2 Ired. L. 42 (N. C., 1844), holding one liable for accidental trespass to realty, seems wrong.

⁴ *Anon.* Y. B. 21 & 22 Edw. I. 206 (1293); *Dougherty v. Stepp*, 1 D. & B. 371 (N. C., 1835).

⁵ *Basely v. Clarkson*, 3 Lev. 37 (1681); *Reynolds v. Edwards*, 6 T. R. 11 (1794); *Jeffries v. Hargus*, 6 S. W. 328 (Ark. 1887). *Russell v. Irby*, 13 Ala. 131 (1847) *Contra*.

of common,¹ where he had a license from one he thought owner,² where as an officer he entered the wrong land to levy an attachment,³ where he entered under void process,⁴ where he had authority from one he thought competent to give it,⁵ where he entered to retake goods which he erroneously thought were his and wrongfully taken by the owner of the land.⁶ No doubt in some cases defendants who had injured realty under a non-negligent mistake would be excused. Judicial officers causing injury to realty through mistaken judgment would be an example.⁷ But clearly in the absence of special reasons for exemption the defendant is held liable. The reasons against such a ruling are identical with those against a like ruling as to personalty and need not be repeated. So far as the law is settled we can hardly hope for change, but the anomaly should not be extended to instances where the rule is not clearly established.

Another field in which the rules we have been noticing have a frequent operation is found in defamation. Here, in distinguishing between accident and mistake, one must keep in mind that the effect which is tortious is *touching* the reputation, if one may use a word which expresses the analogy to battery. The reputation is the thing which is injured. Therefore a case is one of accident when the defendant did not intend and could not reasonably foresee that the plaintiff's reputation would be affected if his (defendant's) words were believed. Accordingly in the following instances the defamation would be accidental and there should not be, and no doubt there is not, any liability: where the defendant does not intend and cannot foresee that the defamatory matter will be heard, read, or understood by a third party at all,⁸ where the de-

¹ *Arche v. de Spolte*, Y. B. 11 & 12 Edw. III. 184 (1337). No discussion at all.

² *Allison v. Little*, 5 So. 221 (Ala., 1889), the court, however, treating defendant as negligent; *Lowenburg v. Rosenthal*, 22 Pac. 601 (Ore., 1889), where the jury expressly found defendant non-negligent; *Herdic v. Young*, 55 Pa. St. 176 (1867); *Huling v. Henderson*, 29 At. 276 (Pa., 1894); *Webber v. Quaw*, 49 N. W. 830 (Wis., 1879); *Hazleton v. Week*, 49 Wis. 661 (1880).

³ *Cole v. Hindson*, 6 T. R. 234 (1795); *Rowe v. Bradley*, 12 Cal. 226 (1859).

⁴ *Rideware v. Sorde*, Y. B. 11 & 12 Edw. III. 500 (1338); *Anon.* Y. B. 11 & 12 Edw. III. 516 (1338).

⁵ *Cubit v. O'Dett*, 16 N. W. 679 (Mich., 1883); *Coventry v. Barton*, 17 Johns. 142 (N. Y., 1819).

⁶ *Chambers v. Bedell*, 2 W. & S. 225 (Pa. 1841).

⁷ Though no case as to injuries to realty was found by a very incomplete search, yet without question judges would be exempt in such a case as in others. So one aiding an officer at his command might be held excused. So no doubt in other exceptional cases.

⁸ A case where accident was proven was not found. Suppose one on retiring at night

fendant reasonably thinks the matter published is something else,¹ where he publishes it not knowing what it is under circumstances making such action non-negligent,² where he knows what is published, but reasonably believes that it will not be understood as defamatory.³ But in the instances of mistake that have arisen the defendant has almost always been held. Such was the decision : where defendant believed the imputation true,⁴ where he published it of the wrong party,⁵ where he was mistaken in thinking himself under a duty to publish which would create a privilege,⁶ where he erred as to the person to whom publication would be privileged.⁷

The cases of privilege in which mistake shows absence of malice are not discussed here for reasons already stated.⁸ In cases of

should give vent to his opinions and a burglar in hiding overhear him. Where the defendant is negligent he is liable. *Pullman v. Hill*, [1891] 1 Q. B. 524; *Allen v. Northam*, 13 S. W. 73 (Ky., 1890). In the last case the point was not discussed and negligence did not affirmatively appear; if not present the case seems erroneous.

¹ *King v. Paine*, 5 Mod. 167 (1696). A criminal case is not very good authority on this point, but this is cited by Clerk & Lindsell, *Torts*, 2d ed. 492, as law. A contrary view is expressed by the editor of the reports in 4 M. & R. 312, note, but seems the less satisfactory view. If negligence is present, liability is clear. *Shepherd v. Whitaker*, L. R. 10 C. P. 502 (1875); *Loibl v. Breidenbach*, 47 N. W. 15 (Wis., 1890). *Thompson v. Dashwood*, 11 Q. B. D. 43 (1883), *contra*, was expressly disapproved of in *Hebditch v. McIlwaine*, [1894] 2 Q. B. 54.

² *Chubb v. Flannagan*, 6 C. & P. 431 (1834); *Day v. Bream*, 2 Moo. & R. 54 (1837); *Emmens v. Pottle*, 16 Q. B. D. 354 (1885); *Queen v. Munslow*, [1895] 1 Q. B. 765, *semble*, in which Wills, J., rightly calls it a case of accidental publication. *Rex v. Clerk*, 1 Barn. 304 (1729), *contra*, being a criminal case, is doubly bad. If negligence appears, defendant is of course liable. *Vitzetelly v. Library*, [1900] 2 Q. B. 170; *Com. v. Morgan*, 107 Mass. 204 (1871), *semble*.

³ *Smith v. Ashley*, 11 Met. 367 (Mass., 1846); *Nye v. Co.*, 104 Fed. 628 (Dist. Minn., 1900). But if negligence is present, defendant is liable. *Hankinson v. Bilby*, 16 M. & W. 442 (1847); *Curtis v. Massey*, 6 Gray 261 (Mass. 1856); *Peterson v. Co.*, 65 Minn. 18 (1896).

⁴ *Wilson v. Fitch*, 41 Cal. 379 (1871); *Burt v. Co.*, 28 N. E. 1 (Mass., 1891); *King v. Root*, 4 Wend. 113 (N. Y., 1829). In *Duncan v. Thwaites*, 5 Dow & R. 462 (1824), the court during argument suggested that such is the law.

⁵ *Brett v. Watson*, 20 W. R. 723 (1872); *Hanson v. Co.*, 34 N. E. 462 (Mass., 1893), all the justices agreeing that mistake would not excuse, the difference being as to whether plaintiff was indicated or not; *Davis v. Marxhauser*, 49 N. W. 50 (Mich., 1891); *Alliger v. Eagle*, 6 N. Y. Supp. 110 (1889); *Griber v. Co.*, 14 N. Y. Supp. 848 (1891); *McClellan v. Co.*, 19 N. Y. Supp. 262 (1892).

⁶ *Stuart v. Bell*, [1891] 2 Q. B. 349, 356, 358, *semble*.

⁷ *Hebditch v. McIlwaine*, [1894] 2 Q. B. 54. The statements to the contrary in *Waring v. M'Caldin*, Ir. R. 7 C. L. 282, 288 (1873), and *Jenoure v. Delmege*, [1891] A. C. 73, must be considered erroneous. This instance, and that of the preceding note, may be considered as mistakes of law. No distinction was taken on that ground, however.

⁸ See *ante*, p. 338, n. 3.

that character the defendant is freed not because of lack of culpability, but on grounds of public policy. It is believed that the application to defamation of the rule that non-negligent mistake does not prevent liability is open to criticism. It is a matter of recent development and the law can hardly be considered settled. In the case of a mistake as to the truth of the defamation, the defendant may well be held. The defence of truth is based rather on the bad standing of the plaintiff than on the meritorious nature of the defendant's act. The defendant is really in fault, though truth be found, but the plaintiff is in no position to complain of the wrong. That the defendant thought the plaintiff would not be able to sue him successfully should not excuse him. But in the other cases the defendant's conduct may be most laudable morally and no blamableness imputable to him, and yet he may be held. That seems of doubtful propriety.

Other instances of decisions concerning the mistake rule are isolated and need not be discussed.¹ We may notice, however, the effect upon the question when the plaintiff causes the mistake. The plaintiff may have caused the mistake intentionally, negligently, or innocently. If he caused it intentionally it would seem clear that he could not recover even though the defendant was negligent in being misled. The courts as usual do not distinguish between negligent and non-negligent mistake on the defendant's part, but relieve him where the plaintiff intentionally misled him, without regard to whether he was negligent or not.² Where the plaintiff caused the defendant's error through negligence the same result should follow. If the defendant was negligent, too, the theory of contributory negligence would bar the plaintiff.³ If the defendant was not negligent the plaintiff is clearly more in the

¹ For example, *Bond v. Chapin*, 8 Met. 31 (Mass., 1844), holding the defendant; *Le Court v. Gaster*, 23 So. 463 (La., 1898), freeing him.

² *Mace v. Cadell*, Cowper, 232 (1774), apparently going too far; *Price v. Harwood*, 3 Camp. 108 (1812); *Morgan v. Brydges*, 1 B. & Al. 650 (1818), *semble*; *Dunston v. Patterson*, 2 C. B. N. s. 495 (1857), *semble*; *Fletcher v. Fletcher*, 28 L. J. R. (Q. B.) 134 (1859), *semble*. The following early cases are *contra*: *Coote v. Lighworth*, F. Moore 457 (1596); *Thurbane & Al. Hardres*, 323 (1664); *Colwill v. Reeves*, 2 Camp. 575 (1811).

³ Cases like *Clark v. Brown*, 116 Mass. 504 (1875), holding defendant liable for defamation though plaintiff negligently led him to believe the matter true, are not in opposition since they rest on a different principle explained, *ante*, p. 349. The defendant is not blameless where he defames another even though he thought he was speaking truth. In fact, he is intentionally and knowingly doing wrong. The plaintiff can therefore recover, though he contributed to defendant's error, except possibly where he intentionally induced the defamation.

wrong. The cases free the defendant.¹ If the plaintiff innocently brought about the error and the defendant was negligent, clearly the latter would be liable.² If both parties are free from fault, the defendant should not be held on the general theory that he is not to blame and the additional point that if he is to blame the plaintiff is equally so. The cases are hardly conclusive.³ Of course if the injury is continued after discovery of the error the defendant is liable, no matter how much the plaintiff was to blame originally.⁴ Also, if the defendant is unjustly enriched by his action he must reimburse the plaintiff to that extent, though not liable in tort.⁵

No doubt some will think it useless to argue against a principle that has such a weight of authority back of it as the one under consideration. It must be admitted that in certain instances the law is settled and that there is a strong tendency to apply the rule used in those cases to others that arise. To such as think it impossible to prevent the spread of the rule, what has been said may at least call attention to the following facts: (*a*) that it is an anomaly inconsistent with the law as to accident, (*b*) that while there are individual sets of fact in which it is not applied, yet it spreads throughout the law of torts and is not confined in its operation to cases of injury to property,⁶ (*c*) that the line between absolute liability and liability only for blamableness, so far as it exists, is not drawn between trespass and case or direct and

¹ Crawford v. Satchwell, 2 Strange 1218 (1745); but this case and others following it may rest on the ground that the real defendant cannot take advantage of a misnomer except by a proper plea; Hills v. Snell, 104 Mass. 173 (1870); Parker v. Walrod, 16 Wend. 514 (N. Y. 1836). Dawson v. Wood, 3 Taun. 256 (1810), in which the language used is broad enough to be *contra*, is supportable as a case of trespass *ab initio*, since the officers detained the goods after learning of the mistake.

² Moore v. Bowman, 47 N. H. 494 (1867).

³ See Glasspoole v. Young, 9 B. & C. 696 (1829); Fletcher v. Fletcher, 28 L. J. R. (Q. B.) 134 (1859), where the defendants were held; Ryder v. Hathaway, 21 Pick. 298 (Mass., 1838), where the defendant was not held; Chapman v. Cole, 12 Gray 141 (Mass., 1858); Pearson v. Inlow, 20 Mo. 322 (1855); Hays v. Creery, 60 Tex. 445 (1883); Formwalt v. Hylton, 1 S. W. 376 (Tex., 1886).

⁴ Dunston v. Patterson, 2 C. B. N. s. 495 (1857); Chapman v. Cole, 12 Gray 141 (Mass., 1858); Hills v. Snell, 104 Mass. 173 (1870), *semble*; Moore v. Bowman, 47 N. H. 494 (1867); Parker v. Walrod, 16 Wend. 514 (N. Y., 1836), *semble*.

⁵ Pearson v. Inlow, 20 Mo. 322 (1855). The court gave the value of the property taken, probably as measuring the plaintiff's actual loss; but the defendant's enrichment should be the measure of damages. Compare the German law in the case of taking property *bona fide* but without consideration, *ante*, p. 347, note 2.

⁶ Both Chief Justice Holmes and Sir Frederick Pollock discuss the matter in places already cited as if so limited. Of course its most conspicuous illustrations are found in such cases and in those of ministerial officers erring in the course of their duties.

indirect injury, but between accident and mistake.¹ In the case of accident the theory of culpability is applied; in the case of mistake the defendant is usually held to act at his peril.

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¹ Statements that as to trespasses and nuisances want of care is immaterial are essentially misleading. One is ordinarily not liable for injuries to realty unless negligent, *ante*, p. 347, n. 3. That only direct injuries to realty are called trespasses, and that these are usually intentional by no means shows that one is liable for accidental trespasses or nuisances. *Cf.* Jaggard, Torts, 747.